

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :
:

- against -

SAHULON BALLESTEROS,

Defendant. : :

APPEARANCES: MICHAEL J. GARCIA, ESQ.

United States Attorney for the
Southern District of New York

By: Glen McGorty, Esq.

Assistant United States Attorney

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SAHULON BALLESTEROS

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Defendant Pro Se

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Defendant Sahulon Ballesteros pled guilty to an indictment charging him with one count of ccnspiracy to import and export five kilograms or more of cocaine. He was sentenced to a term of imprisonment of 120 months. Now proceeding pro se, Ballesteros moves pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence on the grounds that (1) his plea was involuntary because he did not understand the charges against him or the consequences of his plea, (2) the Court erred in failing to determine the exact quantity of drugs attributable to him before imposing the mandatory minimum sentence of ten years,

MEMORANDUM DECISION

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and (3) he was denied effective assistance of counsel. For the reasons set forth below, the motion is denied.¹

BACKGROUND

A. The Facts

From 1990 through 2000, Alberto Orlande Gamboa arranged for the shipment of more than 100,000 pounds of cocaine from Colombia and Venezuela into the United States and other countries. (PSR ¶ 10).² To assist him, German Libonatty, William San Miguel, Julio Annicharico Santrich, Danilo Caballero, Alvaro Caballero, Armando Davila, Musa Jacob Nader Romanos, and the defendant, Sahulon Ballesteros, helped establish and maintain drug trafficking routes between Colombia and the United States. (Id. at ¶ 11). From 1996 through 1998, these individuals, including Ballesteros, conspired to ship cocaine from Colombia and Venezuela to the United States. (Id. at ¶ 19-20). Ballesteros was also Gamboa's personal assistant from 1996 through 1997. (Plea Tr. 13). Generally, Ballesteros drove a car

¹ Because I find that "it plainly appears from the face of the [section 2255] motion . . . and the prior proceedings in the case that [Ballesteros] is not entitled to relief," I do not order the United States Attorney to file an answer to the instant motion. See Rules Governing Section 2255 Proceedings for the U.S. Dist. Courts 4(b); Armienti v. United States, 234 F.3d 820, 822-23 (2d Cir. 2000).

² References are as follows: "Indictment" to the Indictment dated March 26, 2003 (03 Cr. 347); "Plea Agmt." to Ballesteros's plea agreement dated November 11, 2005; "Plea Tr." to the transcript of Ballesteros's plea allocution; "PSR" to the pre-sentence report dated February 24, 2006; "Sen. Tr." to the transcript of Ballesteros's sentencing; and "Def. Mot." to Ballesteros's § 2255 motion.

to transport Gamboa around Cali, Colombia and delivered messages to and from Gamboa in connection with the cocaine trafficking.

(Id.) .³

B. Prior Proceedings

Ballesteros was indicted on March 26, 2003 for conspiracy to import cocaine into the United States from Colombia and Venezuela. By letter dated November 11, 2005, Ballesteros entered into a plea agreement -- which was negotiated by his attorney, Martin L. Schmukler, Esq. -- with the Government. The plea agreement provided that Ballesteros would plead guilty to violating 21 U.S.C. §§ 963, 952(a), and 960(b)(1)(B), in connection with his participation in a conspiracy to distribute at least 150 kilograms of cocaine. (Plea Agmt. 2). The parties stipulated to a total offense level of 27 and a criminal history category of I.⁴

³ The Indictment also includes the following: "In or about 1997 Julio Annicharico Santrich gave Sahulon Ballesteros approximately 10,000 Colombian Pesos (equivalent to approximately 5,000 United States dollars at the time) as payment for the murder of a suspected informant." (Indictment ¶ 5). This allegation, however, was not mentioned in the plea agreement or in any subsequent court proceeding.

⁴ The parties agreed that the November 1, 2000 guidelines manual determined Ballesteros's sentencing guidelines calculation. Pursuant to U.S.S.G. § 2D1.1(c)(4), the applicable base offense level for Count One of the indictment was 38. Because the defendant received an adjustment under U.S.S.G. § 3B1.2, for his minor role in the conspiracy, the base offense level was capped at 30. After additional stipulated adjustments, the final offense level for Count One of the Indictment was 27. (Plea Agmt. 2).

An offense level of 27 with a criminal history category of I carries a guideline range of 70 to 87 months. As explained in the plea agreement, however, because Ballesteros was pleading guilty to a conspiracy involving five or more kilograms of cocaine he was subject to a mandatory minimum of 120 months imprisonment absent relief under the safety valve, 18 U.S.C. § 3553(f). (Plea Agmt. 2). Ballesteros further stipulated that he used "violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense," which rendered the safety valve inapplicable. (Id. at 3). Hence, as Ballesteros stipulated in the plea agreement, he was not eligible for the safety valve and his guideline sentence was 120 months -- the minimum sentence proscribed by law. (Id. at 2-3). The plea agreement also contained a waiver of Ballesteros's right to appeal or otherwise litigate under 28 U.S.C. §§ 2255 and/or 2241 any sentence at or below the stipulated guideline sentence of 120 months. (Id. at 4).

On December 19, 2005, Ballesteros appeared before me and with the assistance of an interpreter pled guilty pursuant to the plea agreement. Ballesteros confirmed that he discussed the plea agreement with his attorney and that he fully understood it before signing. (Plea Tr. 4, 11-12). He further confirmed that he understood the consequences of pleading guilty and that he was entering his plea knowingly and voluntarily. (Id. at 4-7, 9-12, 17-19). The allocution also included the following colloquy:

THE COURT: All right. No one, not your lawyer, not the government, can make promises to you as to what your sentence will be. Because I cannot decide what your sentence is until after the presentence report is completed, I've ruled on any objections to the report, and I have decided whether there is any basis to go above or below the guidelines range. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And in the end, if it should turn out that your sentence is different from what you expect or from what anyone has told you it might be, you will still be bound to your guilty plea and you will not be allowed to withdraw your plea of guilty? Understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now in your plea agreement, you agree that you would not appeal or otherwise try to challenge any sentence at or below the stipulated sentence of 120 months. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And according to the plea agreement, it appears that your sentence will be 120 months, that the mandatory minimum applies. And that your sentence will be no less than 120 months.

THE COURT: Okay. Does that change anything? Does that change your mind?

THE DEFENDANT: No.

(Id. at 10-11, 18). I accepted Ballesteros's plea. (Id. at 19).

Following the plea allocution, the Probation Department prepared a presentence report ("PSR") containing a calculation of the appropriate sentence under the sentencing guidelines. The PSR set the total offense level at 31, the criminal history

category at I, and the guidelines sentencing range at 120 to 135 months. (PSR 15). The Probation Department recommended a term of imprisonment of 120 months. (Id.). The parties did not object to the PSR. (Id. at 14).

At sentencing on March 3, 2006, Ballesteros's attorney urged the Court to impose a sentence no greater than the mandatory minimum sentence of 120 months. (Sen. Tr. 3-4). I accepted and adopted the PSR's guidelines calculation as to the total offense level, criminal history category, and guidelines range, which was consistent with the parties' plea agreement. (Sen. Tr. 3). I sentenced Ballesteros to the minimum possible sentence, 120 months imprisonment. (Id. at 9).

Ballesteros did not appeal. On September 11, 2006, he filed this motion.

DISCUSSION

Ballesteros's motion is denied. First, he waived his right to challenge his sentence, whether by a motion under 28 U.S.C. § 2255 or otherwise. Second, even assuming that Ballesteros is not precluded from challenging his sentence, the motion is denied on the merits.

A. Waiver of Rights

In his plea agreement, Ballesteros explicitly agreed that he would "neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the stipulated Guidelines range." (Plea Agmt. 4). The Second Circuit has held such waivers enforceable:

In no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.

United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993); see also United States v. Djelicic, 161 F.3d 104, 106-07 (2d Cir. 1998) (knowing and voluntary waiver of right to appeal sentence within agreed upon guideline range is enforceable).

The Second Circuit has also held, however, that "a waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been produced, here, the plea agreement." Frederick v. Warden, Lewisburg Corr. Facility, 308 F.3d 192, 195 (2d Cir. 2002) (citing United States v. Hernandez, 242 F.3d 110, 113-14 (2d Cir. 2001) (per curiam)). Accordingly, the district court "does not automatically enforce § 2255 waivers in the face of ineffectiveness of counsel, as such claims 'may call into question the very legitimacy of the § 2255 waivers.'" Itzkowitz v. United States, No. 04 Civ. 63, 2004 WL 1672451, at *2 (S.D.N.Y. July 27, 2004) (citing Mendez v. United States, No. 01 Civ. 2924, 2002 WL 226693, at *2 (S.D.N.Y. Feb. 13, 2002) (quoting Paulino v. United States, No. 01 Civ. 1174, 2001 WL 630486, at *2 (S.D.N.Y. June 6, 2001))).

Ballesteros's motion must be denied because he waived his right to appeal or otherwise challenge his sentence. First, I conducted a thorough allocution and specifically asked

Ballesteros whether he understood that he was giving up his right to appeal or in any other way litigate his sentence if it fell within the range stipulated by the plea agreement, and Ballesteros responded affirmatively. (Plea Tr. 11). Second, Ballesteros confirmed that (1) he discussed the plea agreement with his attorney, (2) the plea agreement was translated and he fully understood it before signing, and (3) he had not been induced or forced in any way to enter into the plea agreement. (Id. at 12). Third, Ballesteros confirmed that he was satisfied with his attorney's representation of him. (Id. at 4). Finally, as discussed below, Ballesteros's ineffective assistance of counsel claim fails on the merits.

Consequently, I find that the plea agreement is valid. Because I sentenced Ballesteros to the stipulated sentence of 120 months, he has waived his right to challenge his sentence and is precluded from making this motion.

B. The Merits

On the merits, Ballesteros argues that: (1) his plea was not entered knowingly and voluntarily because he did not understand that he was waiving his right to a jury trial on the issue of the quantity of drugs attributable to him, (2) the Court fundamentally erred in not determining the drug quantity attributable to him before imposing a mandatory minimum sentence, and (3) he received ineffective assistance of counsel when his lawyer failed to: (a) object or raise the issues addressed in (1) and (2) above, (b) argue that he was eligible for the safety

valve, and (c) inform him of the consequences of the plea agreement.

1. Right to Jury Determination of Drug Quantity

Ballesteros claims that his plea was made unknowingly and involuntarily because he was never advised that he was waiving his right to have a jury determine, beyond a reasonable doubt, the drug quantity attributable to him. (Def. Mot. 15).

Ballesteros's contention, however, is refuted by the record. First, he stipulated in the plea agreement that he was responsible for a total quantity of cocaine of at least 150 kilograms. (Plea Agmt. 2). Second, during the plea allocution he acknowledged that he had discussed the agreement with his attorney and fully understood it before signing. (Plea Tr. 11-12). Third, when the Court asked at the plea allocution whether the conspiracy involved at least 150 kilograms, Ballesteros answered in the affirmative. (Id. at 15).

Based on the foregoing, there was no need for a jury trial because Ballesteros clearly stipulated to the quantity of drugs -- at least 150 kilograms of cocaine. As the Second Circuit has held, a "criminal defendant's self-inculpatory statements made under oath at his plea allocution carry a strong presumption of verity and are generally treated as conclusive in the face of the defendant's later attempt to contradict them." Adames v. United States, 171 F.3d 728, 732 (2d Cir. 1999) (internal citations and quotation marks omitted); United States v. Gonzalez, 970 F.2d 1095, 1100 (2d Cir. 1992) (finding that

defendant's statements at plea allocution are conclusive absent reasons justifying departure from their apparent truth).

Moreover, Ballesteros was specifically advised that he was waiving his right to a jury trial. (Plea Tr. 5). This aspect of the motion is therefore denied.

2. Fundamental Error in Not Determining Drug Quantity

Ballesteros argues that the Court erred in not determining the drug quantity attributable to him before imposing the mandatory minimum sentence of ten years. This argument fails for, again, Ballesteros stipulated to quantity -- at least 150 kilograms of cocaine, far more than the five kilograms needed to trigger the mandatory minimum.

Even if I did not explicitly determine the amount of drugs attributable to Ballesteros, in light of the stipulation I could not have found differently. See United States v. Champion, 234 F.3d 106, 109-10 & n.3 (2d Cir. 2000) ("[A]t trial, [defendant] stipulated to the quantity of drugs involved in his crime Under the stipulation, a jury could not have"). Because Ballesteros stipulated that the conspiracy involved over five kilograms of cocaine, I did not need to determine the amount of cocaine attributable to him beyond that.

3. Ineffective Assistance of Counsel

To prevail on his claim of ineffective assistance of counsel, Ballesteros must show that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) he was prejudiced by

counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668, 686-88 (1984). When applying the Strickland test, "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "The court's central concern is not with 'grad[ing] counsel's performance,' . . . but with discerning 'whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" United States v. Aguirre, 912 F.2d 555, 561 (2d Cir. 1990) (quoting Strickland, 466 U.S. at 696).

Where a defendant challenges a guilty plea on the basis of alleged ineffective assistance of counsel, to satisfy the second prong of the Strickland test the defendant must show that, but for counsel's error, there is a reasonable probability that he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Tate v. Wood, 963 F.2d 20, 23-24 (2d Cir. 1992).

Ballesteros argues that he was denied effective assistance of counsel on four grounds. First, he claims Schmukler failed to object when I accepted Ballesteros's plea without first advising him that he was waiving his right to have a jury determine, beyond a reasonable doubt, the amount of drugs attributable to him. Second, Ballesteros claims that counsel should have objected when I imposed the sentence without determining the amount of drugs attributable to him. Third, Ballesteros claims that he was uninformed of the consequences of pleading guilty and was unaware that he was waiving his right to

challenge his sentence on appeal or collaterally. Lastly, Ballesteros argues that he received ineffective counsel because Schmukler failed to argue that Ballesteros was eligible for the safety valve provision under 18 U.S.C. § 3553(f).

The first and second grounds for his ineffective counsel claim are refuted by the record, for the reasons stated above. Ballesteros had already stipulated to the drug quantity, so Schmukler had no duty to object on the grounds that Ballesteros had a right to have a jury determine quantity or that the Court should have determined a specific quantity. See Mungin v. United States, No. 01 Civ. 5826, 2002 WL 109609, at *2 (S.D.N.Y. Jan. 25, 2002) (concluding that where defendant stipulates to an element in the plea agreement, it would serve little, if any, purpose for defense attorney to object to that element at sentencing).

The third ground is rejected, for, as discussed above, Ballesteros explicitly agreed in the plea agreement to waive his right to appeal or collaterally attack his conviction, and I discussed this with him on the record at the plea allocution. (Plea. Tr. 11).

Finally, Ballesteros cannot prevail on an ineffective counsel argument based on the safety valve provision, 18 U.S.C. § 3553(f), which states:

[T]he court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has

been afforded the opportunity to make a recommendation, that . . . the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense.

18 U.S.C. § 3553(f). Because Ballesteros stipulated to using "violence or credible threats of violence or possess[ing] a firearm or other dangerous weapon in connection with the offense," and further agreed in the plea allocution that he would be ineligible for the safety valve provision, it was not available to him. (Plea Agmt. 3; Plea Tr. 18). Schmukler thus could not have objected.

Accordingly, as Ballesteros has not demonstrated that he received ineffective assistance of counsel, his motion is denied in this respect.

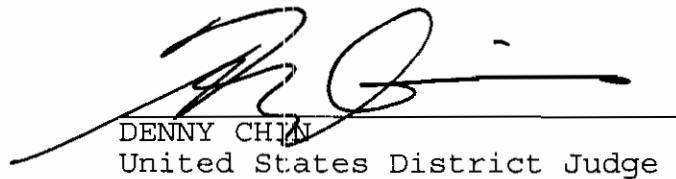
CONCLUSION

For the reasons set forth above, Ballesteros has failed to demonstrate any basis for relief under 28 U.S.C. § 2255. The motion is therefore denied. Because Ballesteros has not made a substantial showing of the denial of a constitutional right, I decline to issue a certificate of appealability. See 28 U.S.C. § 2255 (1996) (as amended by the Antiterrorism and Effective Death Penalty Act). I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal taken from this decision and order would not be taken in good faith.

The Clerk of the Court shall close this case.

SO ORDERED.

Dated: New York, New York
March 16, 2007


DENNY CHIN
United States District Judge